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IN THE

Supreme Court of the United States

October Term, 1963.

No. 561.

E. NEWBOLD SMITH,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITIONER'S RESPONSE TO MEMORANDUM FOR THE UNITED STATES.

JOHN B. HANNUM,
PETER HEARN,
PEPPER, HAMILTON AND SCHEETZ,
2001 Fidelity-Philadelphia Trust Bldg.,
Philadelphia, Pennsylvania 19109.
WILLIAM T. COLEMAN, JR.,
ROBERT W. MARIS,
DILWORTH, PAXSON, KALISH,
KOHN & DILKS,
2635 Fidelity-Philadelphia Trust Bldg.,
Philadelphia, Pennsylvania 19109.
THEODORE O. ROGERS,
26 East Market Street,
West Chester, Pennsylvania.
Attorneys for Petitioner.

International, 711 So. 50th St., Phila., Pa. 19143

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At this Court's invitation, the Solicitor General of the United States filed a memorandum in the above-entitled case.[1] He advises the Court that the federal government never claimed a privilege as to Petitioner's narrowly drawn request for a subpoena to produce the F. B. I. statements of the two key witnesses (p. 11). Yet, the Pennsylvania court refused the subpoena solely because it *assumed* that such a claim had been made by the federal government and that an absolute federal privilege would prevent compliance with the subpoena. (See portion of Pennsylvania Supreme Court Majority Opinion, pp. 2-3, *infra.*) This is the precise error of which Petitioner complains.

1. Respondent, the Commonwealth of Pennsylvania, was requested to file a response to the Petition on or before February 5, 1964, which date was extended until February 18, 1964, but said response has not been filed.

The Solicitor General does not oppose certiorari. In fact, he points out that one of the federal issues before this Court is:

> ". . . whether the trial court erred in denying a subpoena for specific documents which would have called upon the federal government to decide whether to furnish prior statements by witnesses in a State prosecution." (p. 12)

And, on pages 6 and 7 of the Memorandum the Solicitor General notes that the trial judge below refused, even though properly requested, to issue a subpoena duces tecum requiring the F. B. I. agent to produce the prior statement of the two witnesses given to the F. B. I., or to come into court and claim a federal privilege, a privilege which the Solicitor General even now does not assert. He also admits that the F. B. I. has such statements (p. 7, Fn. 5).

There can be no doubt that the refusal of the Pennsylvania trial court to issue the subpoena directed to the F. B. I. agent, at the point in the trial *after* the two witnesses had testified, was solely and exclusively on the ground that the courts mistakenly believed a federal privilege had been asserted and that F. B. I. statements of the two key Commonwealth witnesses therefore would not be produced. For the Supreme Court of Pennsylvania, in its Opinion of July 2, 1963, describes the sole issue before it as follows:

> "At appellant's trial, each of the men maintained that the other was the instigator of the altercation. On this *key* factual issue, two women who were driving on the highway corroborated the police officer's testimony. At this point in the trial, appellant's counsel requested the trial judge to issue a subpoena duces tecum to compel the FBI to turn over statements given to it by the two women.[1] Upon being questioned as

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("1. The statements had been secured by the FBI during its investigation of appellant's claim that the arresting officers had violated his civil rights.")

to the purpose of this production, counsel replied that the statements given to the FBI did not include 'any observation of who struck the first blow' and thus could be used to impeach the testimony of the two women. *The trial judge refused to issue the subpoena after being informed by a representative of the FBI that the Bureau would not produce the reports because they contained confidential information, the disclosure of which would threaten the security of the Justice Department.*" (Emphasis supplied.) (Appendix A to Petitioner's Petition, p. 22)

The Solicitor General does not dispute the Petitioner's Questions Presented. He states merely that the Department of Justice never informed the state trial court that a federal privilege was claimed to the narrowly-drawn request. But the state court mistakenly thought that such a privilege had been asserted by the Department of Justice.

This is the precise error by the Pennsylvania court of which the Petitioner here complains. The wrong is particularly great because the Pennsylvania court mistakenly believed that the Department of Justice had claimed such a privilege and that an absolute federal privilege against production of F. B. I. statements exists (Appendix A to Petitioner's Petition, p. 22).

The Solicitor General of the United States indicates that that the federal government would consider the request if the subpoena is issued. He says:

> "The Department has never been requested to consider whether, in the interests of justice, the information contained in either Miss Sweet's or Mrs. Cochrane's statement to the F. B. I. should be made available to the court and counsel in the Pennsylvania prosecution." (pp. 11-12)

The error which occurred below was not harmless. *Fahy v. Connecticut*, No. 19, Oct. Term, 1963, 32 U. S. L. W. 4021 (December 2, 1963). As Petitioner here stated in his Petition:

> "Further muddying the waters, the Supreme Court of Pennsylvania moved on to a second point: that the case before it was distinguishable from *Jencks* since petitioner herein had been shown *other* completely separate and distinct statements made at a different time by the key prosecution witnesses to the local District Attorney. For that reason the Court concluded that petitioner herein, in contrast to *Jencks*, was not harmed by denial of access to the statements made to the FBI. This ground is seriously misleading. It seeks to draw a veil over a violation of petitioner's rights by treating it as 'harmless error.' Moreover, it is based on the sheerest speculation, since the contents of the statements to the FBI are *ipso facto* unknown, even to the Supreme Court of Pennsylvania. They might contain helpful additional evidence—they were alleged to contain contradictory statements not found in the other statements. In any event, the contents are irrelevant to petitioner's right to compulsory process.[10] Finally, the Court's reasoning would put in the hands of the state prosecutor a convenient and deadly discretionary device for depriving an accused of his constitutional right to obtain statements made by witnesses to the FBI simply by the proffer of some other statement,

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"10. Practically speaking, however, statements made to the FBI necessarily have considerable weight and importance. The FBI has formidable prestige and it is a federal offense, punishable by up to ten years imprisonment, to make false statements to an agency of the United States, 18 U. S. C. 80. See *Marzani v. United States*, 168 F. 2d 133 (D. C. Cir. 1948), *aff'd by an equally divided court*, 335 U. S. 895. Pennsylvania law provides no such penalty for statements rendered to State officers."

however unrelated or helpful, made to the prosecution by the same witness at a different time and under different circumstances."

For the reasons stated above, and as set forth in its Petition for Writ of Certiorari, Petitioner urges that the writ be granted.

Respectfully submitted,

JOHN B. HANNUM,
PETER HEARN,
PEPPER, HAMILTON AND SCHEETZ,
2001 Fidelity-Philadelphia Trust Building,
Philadelphia, Pennsylvania 19109.

WILLIAM T. COLEMAN, JR.,
ROBERT W. MARIS,
DILWORTH, PAXSON, KALISH,
KOHN & DILKS,
2635 Fidelity-Philadelphia Trust Building,
Philadelphia, Pennsylvania 19109.

THEODORE O. ROGERS,
26 East Market Street,
West Chester, Pennsylvania.

February 21, 1964.